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IN THE

Supreme Court of the United States

October Term, 1970.

No. 1,001.

NATIONAL SCREEN SERVICE CORPORATION,
Petitioner,

v.

THE POSTER EXCHANGE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The most striking feature of the brief in opposition is Plaintiff's failure to meet any of the three questions presented by the petition.

In response to the **first** question and National Screen's argument that the decision below conflicts with that of the Third Circuit in **Vogelstein**, Plaintiff contents itself with arguing that the decision below does not conflict with the decision of the Third Circuit in **Lawlor**.

In response to the **second** question and National Screen's argument that the 1957 consent judgment in the Government case should not have been ignored by the courts below but should have been given some effect, Plaintiff argues that the consent judgment is "irrelevant and immaterial" because it is not binding on private litigants who were not parties to the Government case.

In response to the **third** question and National Screen's position that an award in the amount of $450,000 could not be justified under the **Bigelow** formula in the face of more-

precise evidence of damages amounting to only $1,350 after trebling, Plaintiff asserts only that the **fact** of damage before May 16, 1961 was established and that the statute of limitations permits Plaintiff to recover for the four-year period immediately preceding the filing of the complaint on July 17, 1961. Plaintiff fails to show any basis in either the findings or the evidence justifying the claim of damage before May 16, 1961 or any amount in excess of $1,350 after that date.

In short, Plaintiff totally evades the questions presented for review by the device of posing and answering arguments which National Screen does not make.

We shall briefly discuss each of the three questions presented and then certain other matters in the brief in opposition which require reply.

1. Concerning the Conflict With *Vogelstein*.

Plaintiff argues that there cannot be a conflict between the decision below and the decision in **Vogelstein** because **Vogelstein** was "dismissed on a motion for summary judgment" and on the basis of the plaintiff's stipulated agreement to be bound by the results reached after the trial in **Lawlor**. Plaintiff then proceeds to argue that **Lawlor** does not conflict with the decision below because **Lawlor** dealt with a different time period (1943-1949) and because the plaintiffs in **Lawlor** were unable to show that they had sustained any injury.

There is, of course, a basic conflict between the decision here and in **Lawlor** in that here the courts below found illegality in the Producers' license agreements to National Screen whereas the Court of Appeals for the Third Circuit found to the contrary after a protracted trial. But the instant case and **Vogelstein** involve identical legal issues in addition to those in **Lawlor**, and that is why we rely primarily on the conflict with **Vogelstein** as a ground for certiorari. As the district court noted in an earlier opin-

ion in this case, **Vogelstein** was an action "substantially similar to the case at bar" so that the decision there was "persuasive authority in this case."[1]

Plaintiff completely ignores the fact that the court in **Vogelstein** discussed at length the effect of the 1957 consent judgment and the effect of the 1961 refusal-to-deal, both of which were specifically raised in the pleadings in **Vogelstein**. Plaintiff is simply wrong when it says (Brief in Opposition, p. 23) that the basis for the judgment of dismissal in **Vogelstein** was the stipulation to be bound by **Lawlor**, which did not involve those issues. Those issues were decided differently by the court below and by the court in **Vogelstein**, which expressly considered and rejected the very arguments advanced by Plaintiff here.

The **Vogelstein** court, in considering the effect of the 1957 consent judgment, held that the judgment had assured that the licenses to National Screen were "certainly" nonexclusive "after 1957" (A.45). In contrast, the court below held that the consent judgment had left intact "nominally nonexclusive" licenses which were in fact exclusive (A.23) and, like Plaintiff, erroneously characterized National Screen's position, that action which it took in reliance on the judgment should be accorded at least presumptive validity, as a contention that the judgment should have "nationwide res judicata, collateral estoppel effect" (A.25).

Vogelstein dealt with a plaintiff who alleged that he had suffered damage precisely as Plaintiff here claims to have suffered damage as a result of the same 1961 refusal-to-deal—allegations which the **Vogelstein** court assumed to be true. Thus, **Vogelstein** is indistinguishable from the present case. **Vogelstein's** conflict with the decision below in the legal significance accorded to the 1957 consent judgment and the 1961 refusal-to-deal is irreconcilable.

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1. **Poster Exchange, Inc. v. National Screen Service Corp.**, 35 F.R.D. 558, 559 (N.D. Ga. 1963), *aff'd sub nom.* **Poster Exchange, Inc. v. Paramount Film Dist. Corp.**, 340 F.2d 320 (5th Cir.), *cert. denied*, 381 U. S. 936 (1965).

2. Concerning the Effect of the Consent Judgment.

Plaintiff argues that, since the 1957 consent judgment in the Government case is not binding, it is "irrelevant and immaterial," and that is precisely the way the courts below treated it.

National Screen recognizes that the consent judgment is not binding, but we urge that it is highly relevant and material and that action taken in reliance on it should have at least presumptive validity.

In support of its argument that the consent judgment is "irrelevant and immaterial," Plaintiff relies on **Sam Fox Publishing Co. v. United States**, 366 U. S. 683 (1961). While that case does, of course, hold that nonparties may not intervene in a Government antitrust suit as a matter of right because such nonparties are not bound by the outcome of the suit, it does not even remotely suggest that nonparties are not "in any way or to any extent affected thereby" (Brief in Opposition, p. 30). On the contrary, Mr. Justice Harlan's unanimous opinion for this Court clearly suggests the very opposite view (366 U. S. at 694):

> "Second, appellants argue that even should they not be legally precluded from bringing a private action, nevertheless the very existence of the outstanding decree would as a matter of comity either preclude further relief or operate to limit the relief some future equity court might decree. Although there is no reason why such a court need consider the present decree as anything but a **minimum** towards insuring broader representation and more favorable income distribution should a claim for further relief be made out, **there is considerable weight to the argument that the court will feel constrained as a matter of comity at least to build on the foundations of the present decree.** . . . However, it is abundantly clear that this effect is not at all the equivalent of being legally bound, which is what

must be made out before a party may intervene as of right. . . ."[2]

It seems too clear for argument here that the court below—by refusing to give any effect whatever to the consent judgment and, in fact, condemning action taken in reliance on the judgment as a violation of the antitrust laws—did not consider the judgment as a "minimum towards insuring" competition in the standard accessory business or feel the least bit "constrained . . . to build on the foundations" of the judgment.

3. Concerning the Misuse of the *Bigelow* Formula.

The only arguments made by Plaintiff are that it was proper for the court of appeals to hold that liability could be imposed for what had occurred before May 16, 1961 and that there was some evidence that Plaintiff had suffered damage before that date. But that completely ignores the points made in the petition: (1) there was no finding by the district court that Plaintiff suffered any damage whatever before May 16, 1961; and (2) the court of appeals' holding that it did is not supported by the evidence on which the court of appeals relied—*i.e.*, the decline in the number of customers served by Plaintiff, which the evidence shows occurred **after** May 16, 1961, not before as the court of appeals thought. Plaintiff does not meet either of these points.

National Screen's position that there is no evidence of any damage to Plaintiff before May 16, 1961 is confirmed by the fact that the district court refused to make findings requested by Plaintiff (set forth below[3]) as to allegedly

2. Wherever boldface type is used in this brief, the emphasis is ours.

3. Plaintiff's requested findings on this point read as follows (Plaintiff's Requests for Findings of Fact and Conclusions of Law, pp. 7-8):

"20. Prior to May of 1961 because of the various restrictions imposed on plaintiff, limiting it to placing of ten

damaging restrictions imposed by National Screen on Plaintiff during the period before the May 16, 1961 refusal-to-deal. The court also refused Plaintiff's requested findings (set forth below [4]) as to an amount of damage calculated by comparing Plaintiff's net receipts for the four years before commencement of the action with National Screen's.

In view of the district court's refusal to make those findings, Plaintiff's chiding (Brief in Opposition, pp. 32-33) about our failure to quote the statements making clear that Plaintiff never claimed injury for the period before

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orders per day, and the placing of orders on only one day a week plaintiff was unable to obtain a sufficient supply of standard accessories to service its exhibitor customers.

"21. Defendant would refuse to sell plaintiff standard accessories when defendant would make available the same standard accessories to defendant's own exhibitor customers.

"22. As a result plaintiff survived in business to a limited extent by having its friendly customers acquire standard accessories from defendant National Screen and after using the same returning them to this plaintiff for its use in renting those supplies to its other exhibitor customers.

"23. As a result of its restrictive policies in making supplies available to plaintiff defendant captured 98% to 99% of the standard accessory market in the Atlanta Exchange Area (T. 91-92), and perfected its monopolistic control on the 'standard' accessory market to the extent that they were able to eliminate the use of salesmen to call upon exhibitor customers (T. 133 Metherne)."

4. These requested findings read as follows (*id.* at pp. 13-14):

"36. During the four year period in question defendant's gross income from its standard and specialty accessory business in the Atlanta Exchange Area was in the sum of $1,446,528.00. During the same period defendant's costs of material was $776,659.00.

"37. During the four year period in question the plaintiff's gross income was $277,829.00 and plaintiff's costs of material during the same period of time was $154,484.00.

"38. During the period in question by virtue of the monopolistic control of the market in the Atlanta Exchange Area and the defendant's refusal to deal with the plaintiff, plaintiff has been damaged in the sum of $556,535.00 (before trebling)."

the May 16, 1961 refusal-to-deal and that the refusal is the gravamen of the case is another irrelevancy about which no further comment is necessary.[5]

Plaintiff completely ignores the main thrust of National Screen's argument on the damage issue. Plaintiff does not even attempt to justify the court of appeals' unprecedented conclusion that "a comparison of the net receipts of the parties" (A.29) is appropriate here. Plaintiff limits its response to the bare, meaningless observation that the evidence "is obviously sufficient to sustain the award in accordance with the principle announced in *Bigelow*" (Brief in Opposition, p. 35).

It is axiomatic that the function of a damage award is to restore to the plaintiff that which he has lost. **Bigelow** permits the use of a comparison to measure that loss when more-precise evidence is unavailable, provided there is a rational basis for the assumptions implicit in use of the comparison.

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5. In its brief in this Court on an earlier petition for certiorari, Plaintiff conceded that, "Petitioner [National Screen] continued to sell to respondent [Plaintiff] its requirements of supplies of standard accessories until May 16, 1961. . . ." Brief for Respondent in Opposition, p. 5, **National Screen Service Corp. v. Poster Exchange, Inc.**, 385 U.S. 948 (1966).

Both the complaint and the amended complaint (¶ 16) alleged that, "Since May 16, 1961 National Screen has in fact pursued said announced policy of refusing to deal with plaintiff. In spite of requests by plaintiff to be allowed to purchase . . . from National Screen as in the past, National Screen has been and is refusing to deal with plaintiff . . ." (C.A. App. 9-10, 165-166). The only damage allegations were in paragraphs 23 and 24, which alleged that, "Plaintiff has already suffered substantial damages as a result of said refusal to deal [*i.e.*, the refusal-to-deal after May 16, 1961] including loss of profits and the loss of good will built up in connection with said business over a period of twenty years" (¶ 23) and that, "The amount of damages suffered by plaintiff can not be estimated with reasonable accuracy at this time, but if National Screen is not enjoined from said unlawful refusal to deal, plaintiff believes and so alleges that it will be damaged far in excess of $100,000.00" (¶ 24) (C.A. App. 13-14, 169).

Here, there was no rational basis for the court of appeals' use of a theory which assumed that Plaintiff should have done National Screen's volume of business during the four years preceding commencement of the action, that National Screen should have done Plaintiff's volume during that period and, therefore, that National Screen's larger volume should be confiscated and given to Plaintiff in the form of a damage award. There was no evidence which could possibly justify the assumption that, absent the matters complained of, National Screen's and Plaintiff's market shares would have been reversed, since both National Screen and Plaintiff were simultaneously engaged in the same business activity. In **Bigelow**, the fact that one theatre was given first-run pictures necessarily excluded the other theatre from simultaneously exhibiting those pictures, and it was, therefore, reasonable to assume that the plaintiff's theatre, which was at least comparable to defendant's, would have done as well with first-run pictures as defendant's. Accordingly, in such a situation, this kind of comparison is permissible in the absence of any more-precise basis for measuring damages. The only rational comparison available in this record was the comparison between Plaintiff's business before the May 16, 1961 refusal-to-deal and its business thereafter—a comparison which shows a loss of $400 to $500 weekly volume, for a total loss of profits amounting to $450 (Petition, pp. 27-28).

In **Bigelow**, this Court granted certiorari "because of the importance of the problem presented" (327 U. S. at 254). The court of appeals' misapprehension and misapplication here of this Court's **Bigelow** decision present an equally important problem in the administration of private antitrust litigation, which should be reviewed by this Court.

4. Concerning Miscellaneous Inaccuracies and Distortions.

Plaintiff's counterstatement of the case and other factual assertions in the brief in opposition bear no resemblance to the evidence or to the findings in the record in

this case. It would unduly lengthen this reply to discuss all of the instances where Plaintiff has colored and misstated the facts in an obvious effort to paint a villainous picture of National Screen, but a few examples will demonstrate the kind of game Plaintiff is trying to play:

a. On page 4 of the brief in opposition, Plaintiff says, without any record reference, that, "Late in the year 1939, however, petitioner conceived and launched a plan or scheme to eliminate all of the existing poster-renters and, with the help and connivance of the film companies, to appropriate to itself the entire poster-renting business on a national scale." At page 6, after quoting from an internal letter of instructions written by National Screen's sales manager in 1940, Plaintiff says, again without any record reference, that, "The immediate effect of this was to cause twenty-eight poster-renters to sell out, bag and baggage, to petitioner." There was no evidence submitted on this subject and, therefore, no finding. In **Lawlor**, after a protracted trial, the court found to the contrary.[6]

b. Plaintiff asserts that, "in view of all the evidence the trial judge rejected the contention" that National Screen's reason for the 1961 refusal-to-deal was that National Screen had been losing money in the standard accessory phase of its business (Brief in Opposition, p. 18). In fact, it was not "in view of all the evidence" that the dis-

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6. **Lawlor v. National Screen Service Corp.**, Civil Action No. 10,020 (E.D. Pa. Oct. 22, 1958). The district court's Finding of Fact 42 recited the fact of the poster-renter acquisitions, but the court rejected Finding 38 requested by the plaintiffs, which read:

> "At the time of its entering into the standard renting business in 1940, National Screen intended to compel all other existing poster-renters to sell out their businesses to it or to otherwise cease doing business as poster-renters; and at that time, National Screen intended also to prevent any other person from attempting to commence doing business as a poster-renter at anytime thereafter anywhere in the United States."

trict court rejected National Screen's argument that its 1961 refusal-to-deal was a legitimate exercise of business judgment. On the contrary, the district court expressly stated that National Screen's explanation that its actions were validly motivated and its evidence in support of that explanation "cannot be heard" (A.16) in view of the fact that it purchased twenty-eight poster renters in 1940. In **Lawlor**, the court found the purchases validly motivated.

c. Plaintiff brands as "remarkable" and then brushes aside as "a wholly gratuitous self-serving declaration" (Brief in Opposition, pp. 29, 30) National Screen's commitment, at the time the 1957 consent judgment was entered, to continue supplying the poster renters for a year. The Antitrust Division obviously exacted this commitment to provide a transition period during which poster renters could seek and obtain from the Producers the standard accessory licenses made available to all applicants on a nondiscriminatory basis under the terms of the judgment. To make certain that the commitment appeared as a part of the overall plan of relief which the Government had fashioned, the Government put National Screen's letter into the record of the hearing on entry of the consent judgment.

Plaintiff's disdainful attitude toward the relief obtained by the Government is eloquently revealing. Plaintiff has attempted to fabricate a case to support a damage claim to line its pockets at the expense of National Screen on a foundation characterized as "Petitioner's Resort to Exclusive License Agreements" (Brief in Opposition, p. 3). Plaintiff would like to ignore the fact that the consent judgment (which was entered just before the beginning of the four-year damage period in this case and was, therefore, in effect throughout that period) assured that all license agreements would be nonexclusive, affording equal opportunities to all. Plaintiff's disdain is a confession that Plaintiff chose not to avail itself of those opportunities because it was unwilling to assume any of the responsibili-

ties to the Producers which the judgment permitted the Producers to require. The judgment permitted the Producers to require assumption of such responsibilities because the Antitrust Division, after a full study of the facts during the five years the Government case was pending, obviously concluded that the Producers have a legitimate need to obtain commitments that will assure adequate distribution of standard accessories advertising their motion pictures.

Respectfully submitted,

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